Dato' Seri Anwar bin Ibrahim v Tan Sri Dato' Hj Muhyiddin bin Hj Mohd Yassin (the Prime Minister of Malaysia) & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(A)-227–05 OF 2021, W-01(A)-145–03 OF 2021 AND J-01(IM)-226–05 OF 2021

HAS ZANAH MEHAT, VAZEER ALAM AND AHMAD ZAIDI JJCA

12 JUNE 2023

Civil Procedure — Judicial review — Whether subject-matter of proposed judicial review applications was justiciable — Appellants applied for leave to file judicial review to challenge Proclamation of Emergency by Yang di-Pertuan Agong ('YDPA') as well as YDPA's issuance of ordinances whilst the Emergency was in force — Whether such challenges were specifically prohibited by arts 150(6) and (8) of Federal Constitution — Whether High Court had no jurisdiction to adjudicate on such challenges as subject-matter was non-justiciable — Whether appellants' leave applications were therefore rightly dismissed

The three appeals herein were against three separate decisions of the High Court dismissing the appellants' leave applications to file for judicial review to declare ss 11, 14 and 15 of the Emergency (Essential Powers) Ordinance 2021 ('the Ordinance') and arts 150(6) and (8) of the Federal Constitution ('the FC') as unconstitutional and null and void. During the tenure of the first respondent as Prime Minister of Malaysia, the Covid-19 viral infection besieged the nation and in an effort to control the spread of the disease he and his Cabinet advised the Yang di-Pertuan Agong ('YDPA') to declare an Emergency pursuant to art 150(1) of the FC for the reason that the disease threatened the nation's security, economic life and public order. Pursuant to the Proclamation of Emergency, the YDPA, acting on the advice of the first respondent and his Cabinet, also issued ordinances under ss 14 and 15 of the Ordinance suspending the sittings of Parliament and the State Legislative Assemblies until such time it was appropriate for them to reconvene. The appellant in the first appeal (Anwar Ibrahim) was particularly peeved by the decision of the first respondent and his Cabinet to advise the YDPA to suspend Parliament and sought to declare that decision unconstitutional, unlawful and null and void. The appellants, who were either Members of Parliament or State Assemblymen, argued that since the threshold to obtain leave to apply for judicial review was low and that their applications were not frivolous but concerned important questions of law, the High Court should not have dismissed the leave applications but ought to have allowed the appellants to

ventilate their arguments on the merits at the substantive stage of the judicial review process.

Held, unanimously dismissing the appeals and affirming the decisions of the High Court:

(1) Although the threshold to obtain leave to file judicial review was not a high one, the court must, in the first place, be clothed with the jurisdiction to adjudicate the substantive matter that was proposed to be raised in the judicial review application before leave could be granted. In the three appeals herein, the judges of the High Court correctly took the view that they did not have the jurisdiction to adjudicate upon the substantive matter or to grant the reliefs sought. In short, the substantive matters raised were not justiciable (see paras 24 & 31).

(2) The court agreed with the decisions of the High Court that under cll (6) and (8) of art 150 of the Federal Constitution ('the FC'), Parliament intended to exclude judicial review of the decisions to proclaim an Emergency and to promulgate Emergency laws and to shut the doors of the court to any challenge of law made during the Emergency and the Proclamation of Emergency by the YDPA. This was the primary effect in law of cl (8) of art 150. The High Court judges were right in holding that cl (8) of art 150, which had the effect of ousting the jurisdiction of the court, was not unconstitutional. The wording in cl (8) was very clear in that it expressed the very intent of the legislature to insulate the whole process from judicial scrutiny 'in any form' and 'on any ground' (see paras 33–35).

(3) Whilst cl (6) of art 150 of the FC provided in clear terms that no ordinance promulgated and no Act of Parliament passed while a Proclamation of Emergency was in force shall be invalid on the ground of inconsistency with any provision of the FC, cl (8) of art 150 prohibited the making of any challenge against the YDPA's Proclamation of Emergency and promulgation of ordinances under cl (2B) of art 150 (see para 41).

(4) The court was therefore not clothed with jurisdiction as the subject-matter was not amenable to judicial review. Even if leave was granted on the basis of the low threshold, as argued by the appellants, it would be an exercise in futility as the court was barred by cl (8) of art 150 from questioning the exercise of discretion by the YDPA to declare an Emergency. The substantive matters raised in all the proposed judicial review applications were non-justiciable and the court did not have jurisdiction to adjudicate the same. The judges of the High Court in the instant appeals committed no error in refusing the leave applications for judicial review (see para 42).

[Bahasa Malaysia summary

Tiga rayuan di sini adalah terhadap tiga keputusan berasingan Mahkamah Tinggi yang menolak permohonan kebenaran perayu untuk memfailkan semakan kehakiman bagi mendapatkan deklarasi bahawa ss 11, 14 dan 15 Ordinan Darurat (Kuasa-Kuasa Perlu) 2021 ('Ordinan tersebut') dan perkara 150(6) dan (8) Perlembagaan Persekutuan ('PP') sebagai tidak berperlembagaan dan terbatal dan tidak sah. Sepanjang tempoh responden pertama sebagai Perdana Menteri Malaysia, jangkitan virus Covid-19 telah menutup negara dan dalam usaha mengawal penularan wabak tersebut, beliau dan Jemaah Menteri telah menasihatkan Yang di-Pertuan Agong ('YDPA') supaya mengisytiharkan Darurat menurut perkara 150(1) PP atas sebab wabak tersebut mengancam keselamatan negara, kehidupan ekonomi dan ketenteraman awam. Berdasarkan Proklamasi Darurat, YDPA, bertindak atas nasihat responden pertama dan Jemaah Menterinya, juga mengeluarkan ordinan di bawah ss 14 dan 15 Ordinan yang menangguhkan persidangan Parlimen dan Dewan Undangan Negeri sehingga masa yang sesuai untuk mereka untuk berkumpul semula. Perayu dalam rayuan pertama (Anwar Ibrahim) amat kecewa dengan keputusan responden pertama dan Jemaah Menterinya menasihati YDPA untuk menggantung Parlimen dan memohon untuk mengisytiharkan keputusan tersebut tidak berperlembagaan, menyalahi undang-undang dan terbatal serta tidak sah. Perayu-perayu, yang juga Ahli Parlimen atau Ahli Dewan Undangan Negeri, berhujah bahawa memandangkan ambang untuk mendapatkan kebenaran untuk memohon semakan kehakiman adalah rendah dan bahawa permohonan mereka tidak remeh tetapi berkaitan persoalan undang-undang yang penting, Mahkamah Tinggi tidak sepatutnya menolak permohonan kebenaran tetapi sepatutnya membenarkan perayu-perayu untuk mengutarakan hujah mereka mengenai merit pada peringkat substantif proses semakan kehakiman.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Walaupun ambang untuk mendapatkan kebenaran memfailkan semakan kehakiman bukanlah satu yang tinggi, mahkamah mesti, pada mulanya, berpakaian dengan bidang kuasa untuk mengadili perkara substantif yang dicadangkan untuk dibangkitkan dalam permohonan semakan kehakiman sebelum kebenaran boleh diberikan. Dalam tiga rayuan di sini, hakim-hakim Mahkamah Tinggi dengan betul mengambil pandangan bahawa mereka tidak mempunyai bidang kuasa untuk mengadili perkara substantif atau memberikan relif yang diminta. Ringkasnya, perkara substantif yang dibangkitkan adalah tidak wajar (lihat perenggan 24 & 31).

(2) Mahkamah bersetuju dengan keputusan Mahkamah Tinggi bahawa di bawah klausa (6) dan (8) perkara 150 Perlembagaan Persekutuan ('PP'),

Parlimen berhasrat untuk mengecualikan semakan kehakiman terhadap keputusan untuk mengisytiharkan Darurat dan untuk mengisytiharkan undang-undang Darurat dan menutup pintu mahkamah terhadap sebarang cabaran undang-undang yang dibuat semasa Darurat dan Pengisytiharan Darurat oleh YDPA. Ini adalah kesan utama dalam undang-undang klausa (8) perkara 150. Hakim Mahkamah Tinggi adalah betul dalam memutuskan bahawa klausa (8) perkara 150, yang mempunyai kesan menggulingkan bidang kuasa mahkamah, adalah tidak bertentangan dengan perlembagaan. Perkataan dalam klausa (8) adalah sangat jelas kerana ia menyatakan hasrat badan perundangan untuk melindungi keseluruhan proses daripada penelitian kehakiman 'dalam apa jua bentuk' dan 'atas apa jua alasan' (lihat perenggan 33–35).

(3) Walaupun klausa (6) perkara 150 PP memperuntukkan secara jelas bahawa tiada ordinan yang diisytiharkan dan tiada Akta Parlimen diluluskan semasa Perisytiharan Darurat berkuat kuasa adalah tidak sah atas alasan tidak konsisten dengan mana-mana peruntukan PP, klausa (8) perkara 150 melarang membuat sebarang cabaran terhadap Pengisytiharan Darurat YDPA dan pengisytiharan Ordinan di bawah klausa (2B) perkara 150 (lihat perenggan 41).

(4) Oleh itu mahkamah tidak memakai bidang kuasa kerana perkara tersebut tidak boleh dipinda oleh semakan kehakiman. Sekiranya kebenaran diberikan atas dasar ambang rendah, seperti yang dihujahkan oleh perayu, ia akan menjadi sia-sia kerana mahkamah telah dihalang oleh klausa (8) perkara 150 daripada mempersoalkan penggunaan budi bicara oleh YDPA untuk mengisytiharkan darurat. Perkara substantif yang dibangkitkan dalam semua permohonan semakan kehakiman yang dicadangkan adalah tidak wajar dan mahkamah tidak mempunyai bidang kuasa untuk mengadili perkara yang sama. Hakim Mahkamah Tinggi dalam rayuan semasa tidak melakukan kesilapan dalam menolak permohonan kebenaran untuk semakan kehakiman (lihat perenggan 42).]

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193, FC (folld)
Dato' Seri Anwar bin Ibrahim v PP [2010] 5 MLJ 145, FC (refd)
Letitia Bosman v PP and other appeals (No 1) [2020] 5 MLJ 277, FC (refd)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750; [2021] 2 CLJ 579, FC (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1, FC (refd)
Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443, FC (refd)
Phang Chin Hock v PP [1980] 1 MLJ 70; [1979] 1 LNS 67, FC (folld)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296, FC (refd)

A *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759, FC (refd)

Legislation referred to

Emergency (Essential Powers) Ordinance 2021 ss 11, 11(a), 14, 15
B Federal Constitution arts 150, 150(1), 150(2B), (6), (8), (8)(a), (8)(b), 159, 159(1), (3)
Prevention and Control of Infectious Diseases Act 1988
Rules of Court 2012 O 53
Specific Relief Act 1950 s 44
C

Ramkarpal Singh (with Sangeet Kaur Deo, Harshaan Zamani and Simranjit Kaur Chhran) (Karpal Singh & Co) in Civil Appeal No W-01(A)-227–05 of 2021 for the appellant.

D *Gurdial Singh Nijar (with Christoper Leong Sau Foo, Razlan Hadri Zulkifli, Abdullah Abdul Rahman, Abraham Au, Muhammad Hiqmar Danial bin Hidzir, Nirvan Gopalan Khrishnan, Danny Soong Ming, Andrew Khoo and Siti Nura) (Chooi & Company + Cheang & Ariff) in Civil Appeal Nos W-01(A)-145–03 of 2021 and J-01(IM)-226–05 of 2021 for the appellants.*

E *Suzana bt Atan (with Narkunavathy Sundareson and Mohammad Sallehuddin bin Md Ali) (Federal Counsel, Attorney General Chambers) in Civil Appeal Nos W-01(A)-227–05 of 2021, W-01(A)-145–03 of 2021 and J-01(IM)-226–05 of 2021 for the respondents.*

F **Has Zanah Mehat JCA:**

INTRODUCTION

G **[1]** Three appeals before us emanated from the High Courts in Kuala Lumpur and Johor Bahru. They are as follows:

(a) *Dato' Seri Anwar bin Ibrahim v Tan Sri Dato' Hj Muhyiddin bin Hj Mohd Yassin (the Prime Minister of Malaysia) & Anor* (W-01(A)-227–05 of 2021), a decision by Mariana Yahya J at High Court of Kuala Lumpur ('DSAI's appeal');
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(b) *Datuk Seri Salahuddin bin Ayub & Ors v Perdana Menteri, Tan Sri Dato' Hj Mahiaddin bin Md Yasin & Anor* (W-01(A)-145–03 of 2021), a decision by Ahmad Kamal Md Shahid J at High Court of Kuala Lumpur ('DSSA's appeal'); and
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(c) *Hassan bin Abdul Karim v Perdana Menteri, Tan Sri Dato' Hj Mahiaddin bin Md Yasin & Anor* (J-01(IM)-226–05 of 2021); a decision by Evrol Mariette Peters JC at High Court of Johor Bahru ('HAK's appeal').

[2] For this judgment, we will refer to the three appeals as 'the appeals' unless otherwise stated. We have considered the appeals based on their pleaded prayers in the respective applications at the High Court.

[3] DSSA's appeal and HAK's appeal were heard together on 18 August 2012 and were adjourned for a decision on 30 September 2021, Subsequently, the DSAI's appeal was fixed for hearing before us on 28 September 2021. After hearing both parties in DSAI's appeal, we found that the main issues in the appeals were identical. To save judicial time, we delivered our decision on the appeals together on the same day.

[4] The appellants in the appeals are either members of Parliament or the state legislative assembly.

[5] The appeals arose from the applications for leave to apply for judicial review under O 53 of the Rules of Court 2012 ('the ROC') to challenge the validity of the Proclamation of Emergency dated 11 January 2021 published in the Federal Government Gazette PU(A) 7/2021 on 12 January 2021 ('Proclamation of Emergency') and the Emergency (Essential Powers) Ordinance 2021 published in the Federal Government Gazette PU(A) 12/2021 on 14 January 2021 ('Ordinance').

[6] All three High Courts dismissed the aforesaid applications. Aggrieved by the decisions of the High Courts, the appellants appealed to this court.

BACKGROUND FACTS

[7] We adopt the background facts as stated by the High Courts with modifications where necessary. In an effort to curb the rising cases of COVID-19, a nationwide lockdown was imposed under the Prevention and Control of Infectious Diseases Act 1988 ('1988 Act'), known as the Movement Control Order ('MCO') effective from 18 March 2020 to 31 March 2020, published as a Federal Government Gazette PU (A) 91/2020 on 18 March 2020 ('MCO Regulations')

[8] Due to rising COVID-19 cases, the MCO period was extended and the MCO Regulations were amended from time to time,

[9] The Government also declared stricter lockdown, known as the Enhanced Movement Control Order ('EMCO'), in specific places where clusters of COVID-19 cases existed, according to the provisions under the 1988 Act. Despites various steps taken by the government at that material time, the COVID-19 infection continued to rise.

[10] On 12 January 2021, two statements were released to the public on the issuance of a Proclamation of Emergency under art 150(1) of the Constitution made a day earlier by the Yang di-Pertuan Agong ('YDPA'), as follows:

(a) media statement issued on behalf of Istana Negara; and

(b) speech text of the first respondent.

[11] The two statements are briefly said as follows:

(a) on 11 January 2021, the first respondent was granted an audience with the YDPA whereat the first respondent presented his advice and/or the advice of the Cabinet for the YDPA to issue a Proclamation of Emergency under art 150(1) of the Constitution to control and reduce the COVID-19 cases in Malaysia;

(b) upon receipt of such advice, the YDPA believed that the spread of the COVID-19 pandemic had reached a critical stage, and there was a need to issue a Proclamation of Emergency pursuant to art 150(1) of the Constitution; and

(c) the YDPA issued a Proclamation of Emergency dated 11 January 2021, published in the Federal Government Gazette on 12 January 2021 as PU(A) 7/2021.

[12] In the speech text of the first respondent, as mentioned in the High Court judgment of DSAI's appeal, the reasons cited by the first respondent as the basis of his advice to the YDPA were, inter alia, as follows:

> 5. In this regard, as a whole world is currently facing the threat of the COVID-19 pandemic, which has directly become a major threat to the economic life of the people in this country, a declaration of emergency can be made by His Majesty the King, the Yang di-Pertuan Agong. Apart from the sharp increase in positive COVID-19 cases, there are several states in Malaysia, such as Johor, Pahang and Kelantan currently experiencing heavy flooding, directly posing major threats to the safety and economic life of the people.
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> 6. As I explained when announcing the implementation of the Movement Control Order yesterday, COVID-19 infection cases are on the rise and show no sign of decline in the near future. Therefore, the Government needs to have certain powers to ensure that this pandemic can be curbed more effectively and the health services provided to the people are not crippled.

[13] In the Proclamation of Emergency, it is stated that the YDPA has satisfied that a grave emergency existed whereby the security, economic life and public order in Malaysia were threatened arising from the COVID-19 pandemic. The YDPA proclaimed that a grave emergency existed and that the Proclamation of Emergency shall extend throughout the Federation of Malaysia with effect from 11 January 2021 until 1 August 2021 under cl (1) of

art 150 of the Constitution. Clause (1) of art 150 provides that:

> (1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.

[14] Subsequently, the YDPA promulgated the Ordinance, *gazetted* and published in the Federal Government Gazette PU (A) 12/2021 on 14 January 2021, under cl 2B of art 150 on the premise that YDPA was satisfied that immediate action was required to guarantee and preserve the security, economic life and public order. Clause 2B provides that:

> (2B) If at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently, the Yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require.

[15] Sections 14 and 15 of the Ordinance provide as follows:

> 14 Parliament sitting
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> (1) For so long as the emergency is in force —
>
> (a) the provisions relating to the summoning, proroguing and dissolution of Parliament in the Federal Constitution shall not have effect; and
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> (b) the Parliament shall be summoned, prorogued and dissolved on a date as the Yang di-Pertuan Agong thinks appropriate.
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> (2) Any meeting of the Parliament which has been summoned before the coming into operation of this Ordinance but has not been held is cancelled.
>
> 15 Sitting of State legislative Assembly
>
> (1) For so long as the emergency is in force —
>
> (a) the provisions relating to the summoning, proroguing and dissolution of a State Legislative Assembly in the Eighth Schedule to the Federal Constitution, Constitution of any State and any State law shall not have effect; and
>
> (b) a State Legislative Assembly shall be summoned, prorogued and dissolved on a date as the Yang di-Pertuan Agong thinks appropriate after consultation with the respective Ruler or the Yang di-Pertua Negeri.
>
> (2) Any meeting of a State Legislative Assembly which has been summoned before the coming into operation of this Ordinance but has not been held is cancelled.

[16] Section 11(a) of the Ordinance provides that:

> 11 Executive and legislative powers For so long as the emergency is in force —
>
> (a) the Prime Minister and the Cabinet existing immediately prior to the issuance of the Proclamation of Emergency on 11 January 2021 who have been conferred the executive functions shall continue to exercise the executive authority of the Federation and such other persons who have been conferred the executive functions by law shall continue to exercise such functions;
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> (b) the Menteri Besar or Chief Minister and the State Executive Council or State Cabinet of the respective States existing immediately prior to the issuance of the Proclamation of Emergency on 11 January 2021 who have been conferred the executive functions shall continue to exercise the executive authority of the States and such other persons who have been conferred the executive functions by law shall continue to exercise such functions; and
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> (c) the legislative functions to make subsidiary legislation under Federal laws and State laws shall continue to be exercised by the persons so authorized by such laws.

THE RELIEFS SOUGHT

[17] Premised upon the abovementioned facts, the appellants in the appeals filed application for leave for judicial review. Amongst the reliefs sought are for declarations that:

(a) ss 11, 14 and 15 of the Ordinance are unconstitutional and therefore invalid, null and void; and

(b) art 150(6) and 150(8)of the Constitution are unconstitutional.

[18] In DSAI's appeal, the appellant, among others, sought a court declaration that the decision by the Cabinet of Ministers ('Cabinet'), led by the first respondent, to advice the YDPA to promulgate s 14 of the Ordinance, which resulted in the suspension of Parliament, was unconstitutional, unlawful, had no effect and was ultra vires.

GROUNDS OF APPEAL

[19] Based on the appellants' memorandum of appeals, the main grounds of appeal can be summarised as follows:

(a) the High Courts failed to appreciate or to sufficiently appreciate that the threshold for the appellants to overcome in any leave application for judicial review is low. Furthermore, the appellants contend that the leave applications are not frivolous as they dealt with important points of law,

in particular, art 150 of the Constitution and the validity/constitutionality of ss 11, 14 and 15 of the Ordinance;

(b) the nub of the appeals is whether the High Courts were right to have come to a final decision that cll (6) and (8) of art 150 of the Constitution are constitutional and shut the court's door from any challenge or application against the Proclamation of Emergency and the ordinances enacted and/or promulgated under art 150 at the leave stage as opposed to the substantive stage;

(c) whether the decision by the Cabinet, led by the first respondent, to advice the YDPA to promulgate s 14 of the Ordinance, which resulted in the suspension of Parliament, was unconstitutional, unlawful, had no effect and was ultra vires as raised in DSAI's appeal; and

(d) whether the High Court was right to hold that the leave application for an order of mandamus did not comply with the requirements of s 44 of the Specific Relief Act 1950 ('the SRA'), namely, that there was no compliance with the requirements that the appellants must have a clear, specific and well defined legal right to the relief sought, that there must be a duty imposed by law on the respondents to carry out the act required under the mandamus sought and the order should not bind the YDPA as raised in DSSA's appeal.

OUR DECISION

[20] For this judgment, we will only focus on grounds (a) and (b) above, which are the main issues in the appeals and on which the appeals can be finally disposed.

[21] The application for judicial review is governed under O 53 of the ROC which consists of a two-fold process: the leave stage and the substantive hearing. Leave may be granted when the application filed is not frivolous or vexatious and meets the requirement of being an arguable case in favour of granting the reliefs sought for it to be allowed to continue to a substantive hearing (*WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296).

[22] In the three appeals, it was submitted that the appellants had met the threshold. The gist of the appellants' argument is that the High Court should have allowed the appellants to raise the challenge against the Ordinance because the court does not have to deal with the merits at the leave stage. Furthermore, appellants contended that the grounds of reliefs applied for demonstrated that these were not frivolous cases.

[23] In conclusion, the appellants submitted that the applications are not frivolous and leave should not be denied, given the low threshold. If the

decision of the respective High Courts is allowed to stand, it will:

(a) deny the Judiciary the opportunity to a mature and proper consideration of the provisions of the Constitution;

(b) establish a law to be at variance with the doctrine of basic structure; and

(c) render the role of the Judiciary 'illusory and nugatory,' whereby the appellants will be denied access to justice.

[24] At the outset, it bears emphasis that although the threshold for the leave application for judicial review is not a high one, the court must, in the first place, be clothed with the jurisdiction to adjudicate the substantive matter that is proposed to be raised in the judicial review application before leave can be granted. At this juncture, two terms become extremely relevant: justiciability and jurisdiction.

Justiciability

[25] The issue of justiciability arises when the power of the court to determine some matter is questioned. Justiciability was defined and analysed in great detail by the Federal Court in the case of *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443 ('Chin Chee Kow'), as follows:

> *It is trite that not all cases brought before courts are reviewable, Before proceeding to hear a case, a court must first exanime, inter alia, its justiciability.* 'Justiciability' concerns the limits upon legal issues over which a court can exercise its judicial authority. *Non-justiciability* in its administrative law sense *signifies that a matter is not capable of or susceptible to, judicial review, as well as non-justiciability in the sense of there being no jurisdiction to entertain an issue or to grant approved relief.* (Emphasis added.)

[26] A good definition of 'justiciability' can also be found in Chris Finn's 'The Concept of 'Justiciability' in Administrative Law' in Groves & Lee, Australian Administrative Law (2007) which state as follows:

> *The term 'justiciability' refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions.* The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the Executive and the Judiciary. *Thus, a matter may be deemed 'non-justiciable' by a court which feels that its resolution either is beyond the institutional competence of the court or would involve stepping outside its appropriate constitutional role*. (at p 143) (Emphasis added.)

[27] From the authorities cited above, generally, some matters are non-justiciable. When any matter is non-justiciable, the court may refrain from deciding upon the matter.

Jurisdiction of the courts

[28] It is trite that the jurisdiction of the courts is conferred upon by a law. Abdul Hamid Mohamad PCA (as he then was) in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1, where His Lordship made the following pertinent observations:

> [21] ... *The extent of the powers of the courts depends on what is provided in the Constitution.* In the case of the two High Courts, they 'shall have such jurisdiction and powers as may be conferred by or under federal law'. So, we will have to look at the federal law to know the jurisdiction and powers of the courts (in the case of the Federal Court and the Court of Appeal, part of their jurisdiction is specifically provided in the Constitution itself — see art 121(1B) and (2) respectively).
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> [22] *So, even if we say that judicial power still vests in the courts, in law, the nature and extent of the power depends on what the Constitution provides, not what some political thinkers think 'judicial power' is.* Federal law provides that the sentence of death shall not be pronounced or recorded against a person who was a child at the time of the commission of the offence. *That is the limit of judicial power of the court imposed by law*. It further provides that, instead, the child shall be ordered to be detained in a prison during the pleasure of the Yang di-Pertuan Agong or the Ruler or the Yang Di-Pertua Negeri, depending on where the offence was committed. That is the sentencing power given by federal Law to the court as provided by the Constitution. Similarly, in some cases, federal law provides for death sentence, in others, imprisonment and/or fine, some are mandatory and some are discretionary. The Legislature provides the sentences, the court imposes it where appropriate. (Emphasis added.)

[29] Hence, it is trite that the nature and extent of the jurisdiction of the court depend on what the law provides. This principle was affirmed and elucidated in a string of Federal Court decisions, including, inter alia, *Maria Chin*, *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759, *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277, and *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2010] 5 MLJ 145.

[30] Therefore, it is clear that the jurisdiction of the courts can only be conferred by law except for the question of inherent powers.

[31] Hence, based on the above authorities, the answer to the question as to whether the court can exercise its power to examine the substantive matter raised in the judicial review application when the court has no jurisdiction in respect of that matter, must be in the negative. The court must first be clothed

with the jurisdiction to entertain the judicial review application. In respect of all three appeals, the High Courts were of the view that the court is not clothed with jurisdiction to adjudicate upon and grant the reliefs sought. In short, they found the substantive matters raised in the judicial review applications were not justiciable. We agree with that finding for the following reasons.

Articles 150(6) and 150(8) of the Constitution

[32] The essence of the subject matter in all the judicial review applications, which is the subject matter of these appeals, is the Proclamation of Emergency and the Ordinance. Hence, the next pivotal question is whether the court has jurisdiction to inquire into the validity or constitutionality of the Proclamation of Emergency and Ordinance?

[33] We agree with the decisions of the High Courts that under cll (6) and (8) of art 150 of the Constitution, Parliament intended to exclude judicial review of the decisions to proclaim emergency and promulgate emergency laws, as well as shutting the doors of the court to any challenge of law made during the emergency and the proclamation of emergency by YDPA. This is the primary effect in law of cl (8) that was inserted by the Constitution (Amendment) Act 1981.

[34] The three learned judges of the High Courts are right to hold that cl (8) of art 150, which has the effect of ousting the jurisdiction of the court is not unconstitutional. The clear wordings of cll (6) and (8)(a) and (b) are as follows:

> (6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.
>
> (7) ...
>
> (8) Notwithstanding anything in this Constitution —
>
> (a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) *shall be final and conclusive and shall not be challenged or called in question in any court on any ground*; and
>
> (b) *no court Shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of —*
>
> (i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);
>
> (ii) the continued operation of such Proclamation;
>
> (iii) any ordinance promulgated under Clause (2B); or

(iv) the continuation in force of any such ordinance. (Emphasis added.)

[35] The wording of cl (8) is very clear, in that it expresses the very intent of the Legislature, which insulates the whole process from judicial scrutiny 'in any form' and 'on any ground'.

[36] The insertion of cl (8) to art 150 by the Constitution (Amendment) Act 1981 is valid and enforceable as the amendment was made under art 159 cl (1) of the Constitution after having complied with the process that is laid down in cl (3) of the said article. The clear wordings of art 159 are as follows:

(1) Subject to the following provisions of this Article and to Article 161E, *the provisions of this Constitution may be amended by federal law.*

(2) (Repealed).

(3) *A Bill for making any amendment to the Constitution* (other than an amendment excepted from the provisions of this Clause) and a Bill for making any amendment to a law passed under Clause (4) of Article 10 s*hall not be passed in either House of Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of that House.*

(4) The following amendments are excepted from the provisions of Clause (3)**,** that is to say:

(a) any amendment to Part III of the Second or to the Sixth or Seventh Schedule;

(b) any amendment incidental to or consequential on the exercise of any power to make law conferred on Parliament by any provision of this Constitution other than Articles 74 and 76;

(bb) subject to Article 161E any amendment made for or in connection with the admission of any State to the Federation or its association with the States thereof, or any modification made as to the application of this Constitution to a State previously so admitted or associated;

(c) any amendment consequential on an amendment made under paragraph (a).

(5) A law making an amendment to Clause (4) of Article 10, any law passed thereunder, the provisions of Part III, Article 38, Clause (4) of Article 63, Article 70, Clause (1) of Article 71, Clause (4) of Article 72, Article 152, or 153 or to this Clause shall not be passed without the consent of the Conference of Rulers.

(6) In this Article *'amendment'* includes addition and repeal; and in this Article and in paragraph (a) of Article 2 'State' includes any territory. (Emphasis added.)

[37] It was not disputed that the amendment was passed by the required votes of not less than two-thirds number of the Members of Parliament. The Constitution is the supreme law of the Federation, and the court is bound by its clear and express provisions.

[38] Further, on the validity of the Constitution (Amendment) Act 1981, we are also bound by the earlier decision of the Federal court where Suffian LP said in *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70 at p 72; [1979] 1 LNS 67:

> In our judgment, in construing art 4(1) and art 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and *we accordingly hold that Acts made by Parliament, complying with the conditions set out in art 159, are valid* even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts effecting the Constitution and on the other hand ordinary laws enacted in the ordinary way. It is federal law of the latter category that is meant by law in art 4(1) only such law must be consistent with the Constitution. (Emphasis added.)

[39] On the effect of the ouster clause provisions in the legislation, based on the judicial precedents, we are bound based on the doctrine of *stare decisis* by the earlier decisions of the Federal Court, amongst others, namely the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193, which stated that no challenge could be made to the continued operation of an ordinance made under art 150 of the Constitution. Haidar Mohd Noor FCJ (as he then was) stated the following:

> ... Here we are dealing with the law that was promulgated under special provisions of Part XI of the Constitution, which is, art 150 (the proclamation of emergency). It should be noted that there is the overriding provision in cl (8)(b) of art 150 itself that 'notwithstanding anything in this Constitution' *the court shall have no jurisdiction to entertain or determine any application in whatever form, on any ground, regarding the validity of, inter alia, the continuation in force of the Ordinance.* It may be argued such a constitutional provision would amount to 'closing the doors of the court' and is therefore harsh and unjust. Our answer is that this issue should be addressed to the legislature and not the courts by those who disagree with such a provision and they have their remedy at the ballot box (*Lok Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at p 188). (Emphasis added.)

[40] In the recent decision of the Federal Court, it was again emphasised in the majority decision of *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750; [2021] 2 CLJ 579 at para 614 of the judgment of Abdul Rahman Sebli FCJ, which states that the whole integrity of the Federal Constitution will be undermined if the courts were to disregard the limitations imposed by Parliament (which represents the will of the people).

[41] In the upshot, cl 6 of art 150 of the Constitution provides in clear terms that no legislation enacted pursuant to a Proclamation of Emergency shall be invalid on the ground of inconsistency with any provisions of the Constitution. Meanwhile, cl (8) of art 150 prohibits any challenge to be made against the emergency proclamation and the emergency ordinances proclaimed by the YDPA.

[42] In conclusion, based on the foregoing paragraphs, the court is not clothed with jurisdiction as the subject matter is not amenable to judicial review. Now, even if leave were to be granted on the basis of lower threshold as argued by the appellants, it would be an exercise in futility as the court is barred by cl (8) of art 150 from questioning the exercise of discretion by the YDPA under cl (1) of art 150 on the Proclamation of Emergency. In this regard, we agree with the High Courts that the substantive matters raised in all three proposed judicial review applications are non-justiciable and the courts do not have jurisdiction to adjudicate the same, Thus, we find that the three learned judges of the respective High Courts have committed no error in refusing the leave applications for judicial review. We, therefore, dismissed the three appeals, and the decisions of the High Courts are affirmed, with no order as to costs.

Appeals dismissed and the decision of High Court affirmed.

Reported by Ashok Kumar